Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–55 OF 1999
GOPAL SRI RAM, MOKHTAR SIDIN AND ABDUL KADIR SULAIMAN JJCA
24 NOVEMBER 2005

Administrative Law — Rights and liabilities of public servants — Dismissal of public servant for misconduct — Failure to provide notes of proceedings — Failure to record a finding of guilt — Whether dismissal lawful — Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 reg 6

The respondent was a Police Constable in the Royal Malaysian Police Force. He was dismissed for misconduct. He brought an action against the appellants claiming a declaration that his dismissal was wrongful and for consequential relief which included an award of damages to be assessed. Four charges were brought against the respondent. At the conclusion of the disciplinary enquiry the respondent was told that he was dismissed from the force. But he was not told what the decision was in respect of each of the charges. The learned High Court judge struck down the respondent's dismissal because he had not been supplied with the notes of proceedings at the enquiry. The other ground on which the learned High Court judge found for the respondent was that there had been a failure on the part of the adjudicating authority to record a finding of guilt against him (reg 6 of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations')). The appellants appealed to the Court of Appeal.

Held, allowing the appeal:

(1) On the facts, the notes of proceedings were requested for and refused after the disciplinary enquiry had concluded and the decision to dismiss had been made. So, it could not have had any bearing whatsoever on the procedure that had been adopted. It may have been different if there had been a partial hearing and an adjournment. If, in those circumstances the respondent had asked for the notes recorded at the previous session, it may have been unfair to have refused them if, for example, he needed them to confront a witness or to make a submission. But that was not the fact pattern here. There was no nexus whatsoever between the refusal to supply the notes and the conduct of the enquiry (see para 5).

(2) The non-compliance of reg 6 of the Regulations has occasioned no prejudice to the respondent. That was because a reasonable tribunal armed with the facts available would have come to the same conclusion as the deciding authority in this case. There was no doubt that a reasonable tribunal armed with the facts established by the respondent's plea of guilt would have found him guilty and ordered his dismissal. So, applying the consequences test formulated in *R v Immigration Appeal Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231, the court

found that the breach of reg 6 of the Regulations has produced no adverse consequence on the respondent. It is not enough that the rule of procedure has been breached. The breach must produce consequences adverse to the party complaining of the breach. That requirement is, on the facts of the present instance, plainly absent (see para 12).

(3) The learned judge, apart from directing the assessment of emoluments, also directed damages to be assessed. That order was, with respect, wrong. In the case of a public servant, an order of reinstatement at common law may be made. It has the effect of putting a plaintiff in the same position as he would have been had he not been dismissed. So he will get all his arrears of salary. But he is not entitled to damages in addition. That would be bad for double accounting (see para 15).

[Bahasa Malaysia summary

Responden adalah Polis Konstabel di dalam Polis Royalti Malaysia. Responden dipecat daripada tindakan salah laku. Responden telah membawa tindakan terhadap perayu-perayu meminta suatu deklarasi bahawa pemecatannya adalah salah dan bagi relif berbangkit yang termasuk ganti rugi award untuk tafsiran. Empat caj telah dibawa terhadap responden. Pada akhir disiplin siasat, responden diberitahu bahawa dia dipecatkan daripada kuatkuasa polis. Tetapi tidak diberitahu apa keputusan berkenaan dengan setiap caj tersebut. Hakim Mahkamah Tinggi yang bijaksana telah membatalkan pemecatan responden kerana tidak dibekalkan dengan nota-nota prosiding semasa pertanyaan. Satu lagi alasan yang diberikan oleh Hakim Mahkamah Tinggi yang bijaksana ialah wujud kegagalan di pihak berkuasa penghukuman untuk mencatat kesalahan terhadapnya (peraturan 6 Peraturan-Peraturan Polis (Tingkahlaku dan Disiplin) (Pegawai Polis Junior dan Konstabel) 1970 ('Peraturan tersebut')). Perayu-perayu telah merayu kepada Mahkamah Rayuan.]

Diputuskan, membenarkan rayuan:

(1) Atas fakta-fakta ini, nota-nota prosiding telah diminta dan ditolak selepas pertanyaan disiplin ditamatkan dan keputusan untuk menyingkirkan responden telah dibuat. Oleh itu, ia tidak boleh mempunyai sebarang impak ke atas prosedur yang diambil. Ia mungkin berlainan jikalau terdapat sebahagian perbicaraan dan penangguhan. Jika didalam keadaan-keadaan tersebut responden telah meminta nota-nota direkodkan pada sesi sebelumnya, ia mungkin tidak adil untuk menolaknya, jika, sebagai contoh responden memerlukannya untuk menghadapi saksi atau untuk membuat satu penghujahan. Tetapi, ia bukan satu corak fakta di sini. Tidak ada sebarang perhubungan antara keengganan membekalkan nota-nota dan pengendalian siasatan itu (lihat perenggan 5).

(2) Ketidakpatuhan peraturan 6 Peraturan tersebut tidak membawa sebarang prejudis kepada responden. Ini adalah kerana tribunal yang bertimbang rasa dengan semua fakta-fakta berkenaan mungkin akan tiba kepada keputusan yang sama seperti dalam autoriti yang diputuskan dalam kes ini. Tidak ada keraguan bahawa tribunal yang bertimbang rasa dengan semua fakta-fakta

yang diwujudkan oleh akuan bersalah responden akan mendapati responden bersalah dan memerintahkan pemecatannya. Jadi, dengan menggunakan ujian kesan yang dirumuskan dalam kes *R v Immigration Appeal Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231, mahkamah mendapati bahawa perlanggaran peraturan 6 Peraturan tersebut telah mengeluarkan kesan-kesan bertentangan untuk responden. Adalah tidak mencukupi bahawa aturan prosedur telah dilanggar. Perlanggaran tersebut mesti mengeluarkan kesan-kesan bertentangan terhadap pihak yang mengadu tentang kemungkiran. Keperluan itu atas fakta-fakta yang dibentangkan disini adalah tidak kelihatan (lihat perenggan 12).

(3) Hakim yang bijaksana, selain daripada mengarahkan penafsiran emolumen-emolumen juga telah mengarahkan penafsiran ganti rugi. Perintah tersebut yang berkenaan adalah salah. Di dalam hal pengkhidmat awam, satu perintah pengembalian pada common law mungkin perlu dibuat. Itu mempunyai kesan meletakkan plaintiff di dalam posisi yang sama seperti mana sebelum plaintif dipecatkan. Oleh itu, plaintif akan mendapat semua tunggakan pendapatannya. Tetapi, plaintif tidak berhak kepada ganti rugi tambahan. Itu adalah tidak baik bagi perkiraan dua kali ganda (lihat perenggan 15).

Notes

For a case on rights and liabilities of public servant, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 669.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (refd)

Board of Education of the Indian Head School, The v Knight [1990] 1 SCR 65 (refd)

B Surinder Singh Kanda v Government of the Federation of Malaya [1962] MLJ 169 (refd)

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321 (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar; Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (refd)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29 (refd)

Kioa West [1985] 159 CLR 550 (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2000] 3 MLJ 281 (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal [2001] 2 MLJ 417 (refd)

M Sentivelu a/l Marimuthu v Public Services Commission Malaysia & Anor [2005] 5 MLJ 393 (refd)

Mokhtar bin Amin v Mohamed Moktar bin Omar [2001] 4 MLJ 329 (refd)

R v Immigration Appeal Tribunal ex parte Jeyeanthan [1999] 3 MLJ All ER 231 (refd)

Legislation referred to

Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 r 6

Appeal from: Civil Suit No S2–23–54–93 of 1998 (High Court, Kuala Lumpur)

Amarjeet Singh (Senior Federal Counsel) for the appellants.
Karpal Singh (Karpal Singh & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The respondent before us (plaintiff in the court below) was a Police Constable in the Royal Malaysian Police Force. He was dismissed for misconduct. He brought an action against the appellants (defendants in the court below) claiming a declaration that his dismissal was wrongful and for consequential relief which included an award of damages to be assessed. He succeeded. The defendants now appeal to us.

[2] The facts of the case have been interrogated fully by the trial judge and it therefore suffices to deal with them briefly. Four charges were brought against the plaintiff. The first alleged that he had quarrelled with his wife and was therefore guilty of conduct unbecoming of a member of the Force. The second alleged that he had been found in a hotel room with an underaged girl and had by his conduct brought the force into disrepute. The third alleged that he had, in the course of a departmental investigation, lied that he had married one Nafisah bte Abd Kadir. We will not mention the fourth charge as it was not proceeded with at the inquiry. The first charge is also irrelevant to the plaintiffs claim as he received only a severe reprimand on it. The plaintiff pleaded guilty to the third charge and claimed to be tried on the second. At the conclusion of the inquiry, the plaintiff was told that he was dismissed from the force. But he was not told what the decision was in respect of each of the charges.

[3] The learned judge struck down the plaintiff's dismissal because he had not been supplied with the notes of proceedings at the enquiry. According to the trial judge, 'the non-supplying of the notes of proceedings goes to the validity of the decision making process of the orderly room proceedings against the plaintiff held on 7 June 1990.' With respect we do not agree. We will explain why.

[4] We begin with what we consider to be the following well-established propositions:

(i) a decision by a public law decision-maker may be struck down by the courts on grounds of procedural unfairness or Wednesbury unreasonableness (see A*nisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147);

(ii) the content of procedural fairness is not fixed. It is a flexible concept and whether there has been procedural fairness in a given case depends on the facts and circumstances of that case (see *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 65; *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29);

(iii) The essential requirements of an acceptable procedure is that it be fair and impartial (see *B Surinder Singh Kanda v Government of the Federation of Malaya*

[1962] 2 MLJ 169. Fairness includes, but is not confined to, the right to be heard which in some cases may be satisfied by the grant of a right to make written representations (*Ghazi bin Mohd Sawi v Mohd Haniff bin Omar; Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114) whilst in others it can only be satisfied by an oral hearing (see *M Sentivelu a/l Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393);

(iv) The test to determine whether the particular procedure adopted in a given case was fair is subjective. The court must place itself in the shoes of the decision-maker and decide whether the procedure adopted provided adequate fairness to the person concerned. See *Kioa v West* (1985) 159 CLR 550 where Brennan J said:

> What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As the obligation to observe the principles of natural justice is not correlative to a common law right but is a condition governing the exercise of a statutory power, the repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised. When the question for the court is whether the condition is satisfied, *the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.* (Emphasis added.)

[5] On the facts of the present case the notes of proceedings were requested for and refused *after* the disciplinary enquiry had concluded and the decision to dismiss had been made. So, it could not have had any bearing whatsoever on the procedure that had been adopted. It may have been different if there had been a partial hearing and an adjournment. If, in those circumstances the plaintiff had asked for the notes recorded at the previous session, it may have been unfair to have refused them if, for example, he needed them to confront a witness or to make a submission. But that is not the fact pattern here. There is, here, no nexus whatsoever between the refusal to supply the notes and the conduct of the enquiry.

[6] The other ground on which the learned judge found for the plaintiff was that there had been a failure on the part of the adjudicating authority to record a finding of guilt against him. The relevant written law is reg 6 of the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, the relevant parts of which read as follows:

6(1) The charge shall be read out to the officer by the adjudicating authority and if necessary explained to him. He shall then be called upon to plead to the charge.

(2) If the officer pleads guilty —

(a) the adjudicating authority shall record briefly the facts in support of the charge and shall explain them to the officer. The facts will be obtained by

questioning any officer or witness who has knowledge of the facts, or if the adjudicating authority has been supplied with any documents containing the facts of the charge, by reference to such documents;

(b) the officer shall then be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, such fact shall be recorded;

(c) the adjudicating authority shall then record a finding of guilt and award a punishment in respect of the offence.

(6) The adjudicating authority shall record its finding on the evidence. If the finding is one of guilty, the officer shall be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, that fact shall be recorded.

[7] It is true that regs 6 (2)(c) and 6 (6) were not complied with. The learned judge treated these instances of non-compliance as fatal because of the use of the word 'shall' appearing in the relevant paragraphs of the Regulation. With respect, we are unable to agree with the learned judge's approach.

[8] The correct approach to determine whether a particular *procedural* provision is mandatory is not the fact that it employs words that prima facie carry a tenor of compulsion; for example, the word 'shall'. The correct test is that stated by Lord Woolf MR in *R v Immigration Appeal Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231 which was applied by this Court in *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329 and *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 We quote from the judgment of the then Master of the Rolls:

> An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see *Wade and Forsyth Administrative Law* (7th Ed 1994) p 255; *Supperstone and Goudie Judicial Review* (2nd Ed 1997) Ch 4 and *de Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th Ed 1995) pp 265-271). Frequently the investigation involves doing no more than deciding the sense in which the word 'shall' has been used as part of a particular procedural requirement. As the word 'shall' is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. *Much more important is to focus on the consequences of non-compliance.* Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement. (Emphasis added.)

[9] In a later passage, the Master of the Rolls said this:

> I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows:

> Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
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> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

[10] Mr Karpal Singh submits that the consequences of failure to record a conviction is that his client was deprived of making a plea in mitigation so as to obtain a lesser punishment than dismissal. We accept that there is much force in the learned counsel's argument and we must confess that it has given us much anxiety in this case. But after very careful consideration, we have come to the conclusion that the non-compliance has occasioned no prejudice to the plaintiff. That is because a reasonable tribunal armed with the facts available would have come to the same conclusion as the deciding authority in this case.

[11] Put aside the second charge for a moment. The third charge to which the plaintiff pleaded guilty is a serious one. Telling a lie to internal investigators is conduct that most certainly brings the Force into disrepute. It shows a lack of the required calibre of an officer in the position of the plaintiff. Police officers as enforcers of the law are expected to observe a code of conduct above that of ordinary citizens. It is vital that standards are kept as high as possible so that the public confidence in our premier law enforcement agency — His Majesty's Police Force — is not eroded. Hence no judgment of this court must have the conscious effect of lowering the standards established by those in charge of maintaining discipline in the Force.

[12] There is no doubt that a reasonable tribunal armed with the facts set out in the third charge established by the plaintiff's plea of guilt would have found him guilty and ordered his dismissal. So, applying the consequences test formulated in *ex parte Jeyeanthan* we find that the breach of reg 6 has produced no adverse consequence for the plaintiff. In our judgment, it is not enough that the rule of procedure has been breached. The breach must produce consequences adverse to the party complaining of the breach. That requirement is, on the facts of the present instance, plainly absent.

[13] In his judgment, the learned judge said this:

> I reject the defendant's argument that the failure to record the finding of guilt is merely an irregularity. This failure to record such an important factor in the proceedings clearly affects the validity of the decision making process of the proceedings. Whilst it is easy to assume as suggested by Mr Amarjeet Singh for the defendants that since the plaintiff was given an

opportunity to plead in mitigation the non-recording of the finding of guilt is merely directory as being purely procedural and does not give the plaintiff a legal right of redress in a court of law, such an assumption falls foul of art 135(2) of the Federal Constitution.

[14] We can well understand the learned judge's reluctance to accept a submission that reg 6 was merely directory. It may well be that if his attention had been drawn to *ex parte Jeyeanthan* his decision may well have been different. But we are unable to agree with the judge that the failure to record the conviction violates art 135(2) of the Federal Constitution. That article requires that a person such as the instant plaintiff be given a reasonable opportunity to be heard. That requirement was amply met on the facts of this case. We are also unable to accept Mr Karpal Singh's contention that his client reasonably lost an opportunity to make a plea in mitigation, and that therefore he had no reasonable opportunity to be heard. At one point in time we thought that the deprivation of the right to enter a plea in mitigation vitiated the decision making process. We said so in *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281. But we were reversed (see *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417. And so we return to the main point in this case. It is that the breach of reg 6 has had no adverse consequences for the plaintiff.

[15] There is one other point. The learned judge, apart from directing the assessment of emoluments, also directed damages to be assessed. That order is, with respect, wrong. In the case of a public servant, an order of reinstatement at common law may be made. It has the effect of putting a plaintiff in the same position as he would have been had he not been dismissed. So he will get all his arrears of salary. But he is not entitled to damages in addition. That would be bad for double accounting.

[16] For the reasons given, we would allow the appeal and set aside the orders of the High Court. As for costs we must say this. The appeal succeeds not entirely because of the arguments presented by the defendant. That is not to say that Mr Amarjeet Singh has not been of assistance. He has. But this is a case where justice requires that there be no order as to costs here and below.

Appeal allowed.

Reported by Peter Ling